



IT IS ORDERED as set forth below:

Date: November 17, 2008

Mary Grace Diehl

**Mary Grace Diehl
U.S. Bankruptcy Court Judge**

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION**

| | | |
|------------------------------------|---|---------------------|
| In re: | : | CASE NUMBER |
| | : | |
| LINDA COTY BULLOCK, | : | 08-43724-MGD |
| | : | |
| Debtor. | : | CHAPTER 11 |
| | : | |
| HGP CAPITAL, LLC, | : | |
| | : | |
| Movant, | : | |
| | : | |
| vs. | : | Contested Matter |
| | : | |
| LINDA COTY BULLOCK and | : | |
| Co-Debtor JAMES W. BULLOCK, | : | |
| | : | |
| Respondents. | : | |

**ORDER DENYING MOTION TO DISMISS
AND DENYING MOTION TO VALIDATE FORECLOSURE SALE**

Before the Court is Movant HGP Capital, LLC's ("Movant") Emergency Motion to Dismiss Case and Declare Debtor Ineligible to File Bankruptcy Under 11 U.S.C. Section 109(g)(2), or, in the

alternative, Motion for Relief from Stay to Cry Foreclosure and Validate Sale (“Emergency Motion”). (Docket No. 5). A telephonic hearing was held on November 4, 2008 and an Order was entered modifying the automatic stay only to permit Movant to cry its foreclosure sale, but not to record its deed. A hearing was held on the Emergency Motion on November 12, 2008. Present at the hearing were Evan M. Altman, counsel for Debtor, Linda Coty Bullock (“Debtor”), Mathew A. Schuh, counsel for HGP Capital, LLC (“Movant”) and John Mahorner, a representative of Movant. Due to the unusual circumstances of Debtor’s prior case, the lack of evidence that Debtor dismissed her prior case in response to Movant’s Motion for Relief from Stay, and the evidence that Debtor’s estate has significant equity in the property that is the subject of Movant’s Motion, Movant’s Emergency Motion is **DENIED**.

I. FACTS

The present case is Debtor’s second bankruptcy case before this Court. Debtor’s prior bankruptcy case (Case No. 08-42065-MGD) was filed as a Chapter 13 case on July 1, 2008, and dismissed on September 10, 2008 (Docket No. 26). Debtor’s present case was then filed on November 3, 2008, which is fifty-four days after the prior case was dismissed. Movant contends that Debtor is ineligible to file her present case under 11 U.S.C. § 109(g)(2) because Debtor voluntarily dismissed a bankruptcy case and filed a new one within 180 days. The Court’s analysis of the applicability of 11 U.S.C. § 109(g)(2) to the present case requires a more extensive investigation into the facts leading up to the dismissal of Debtor’s prior case.

A. Debtor’s Prior Case

Shortly after Debtor filed her first case, Movant filed a Motion to Convert to Chapter 7 or in the Alternative Motion to Dismiss (“Motion to Convert/Dismiss 13”) on July 16, 2008. (Docket No.

9). In that motion, Movant asserted that Debtor owed Movant more than \$1.5 million, which would make Debtor ineligible for relief under Chapter 13 of the Bankruptcy Code.¹ (Docket No. 9). As a result, Movant sought to have Debtor's case either converted to a Chapter 7 case or dismissed. Eight days later, Movant filed a Motion for Relief From Stay ("Motion for Relief"). The docket indicates that Movant served the notice of hearing for the Motion for Relief (Docket No. 18), but there is no indication that Movant ever actually served Debtor with the Motion for Relief. As scheduled by Movant, hearings were to be held on both the Motion to Convert/Dismiss 13 and the Motion for Relief on August 13, 2008. On that date, the Motion for Relief was reset to September 10, 2008 and Debtor announced her intent to convert her Chapter 13 case to a Chapter 11 case within seven days or there would be no opposition to granting Movant's Motion to Convert/Dismiss.

On August 19, 2008, Debtor filed a Motion to Convert Chapter 13 to Chapter 11 ("Debtor's Motion to Convert"). (Docket No. 21). On the same day, Debtor paid the \$765 filing fee to convert her case. (Docket No. 22). No party filed an objection to Debtor's Motion to Convert. Debtor's Motion to Convert was scheduled for a hearing on September 10, 2008, which was the same day as the rescheduled hearing on Movant's Motion for Relief. On September 9, 2008, Debtor filed a Motion to Dismiss, which stated that Debtor "hereby dismisses her Chapter 13 case without prejudice." (Docket No. 24). Again, no party filed any objection to Debtor's Motion to Dismiss and Debtor's case was dismissed on September 10, 2008 without Court consideration of the Motion. (Docket No. 26). Fifty-four days later, Debtor filed her present Chapter 11 case.

¹ Among other restrictions, 11 U.S.C. § 109(e) limits debtors in Chapter 13 cases to individuals with "noncontingent, liquidated, secured debts of less than \$1,010,650."

B. Debtor's Present Case

At the hearing on November 12, 2008, Debtor testified that she sought to have her prior case converted to a Chapter 11 case when she learned that she was ineligible for a Chapter 13 case. Upon learning of the dismissal and being advised that her attorney from the prior case would not represent her in a Chapter 11 case, Debtor waited approximately a month and a half to file her new case because she expected to complete a refinancing deal that would permit her to pay off Movant's loans. Debtor filed her present case on November 3, 2008. Immediately thereafter, on November 4, 2008, Movant filed its Emergency Motion. (Docket No. 5). As noted above, the Court modified the automatic stay on November 5, 2008, to permit Movant to cry the foreclosure sale, but reserved the remainder of Movant's motion for hearing. (Docket No. 9). At the hearing, on November 12, 2008, the Court heard testimony and argument of counsel and admitted documents into evidence.

Aside from Debtor's testimony regarding how her prior case was dismissed and her present case was filed, the Court heard testimony regarding the value of Debtor's farmland, which is one of the properties securing Movant's loans. Bruce Penn, a certified real estate appraiser, testified regarding the value of Debtor's farmland. Mr. Penn's expert opinion is that Debtor's property was worth over \$6,000,000 as of September 1, 2008, when he last appraised the farm. He further testified that the property had the same value on November 12, 2008. Mr. Penn's appraisal of Debtor's property was based on comparable sales made in 2005 and 2006. Mr. Penn justified his reliance on older comparable sales in the presently declining market by explaining that he had not adjusted the value of Debtor's property up as he would normally do. Finally, Mr. Penn testified that Debtor's property would be worth at least \$5,000,000 even if Debtor discounted the property to sell it immediately. While no contrary expert opinion was offered by Movant, Mr. Mahorner did testify

that he had relied on a developer's valuation of the property at approximately \$5,000,000 when Movant made Debtor the loan in January, 2007. Mr. Mahorner further testified that Movant did not want title to the property - it wanted to be paid.

Debtor has extensive equity in her property beyond the amount of her indebtedness to Movant. Mr. Mahorner testified that Movant holds a second mortgage on Debtor's property, which is based on a loan of \$485,000. The primary mortgage, to which Movant's interest would be subject, is for \$800,000 and is held by another entity affiliated with Movant. The total indebtedness of Debtor's farmland is somewhere near \$1,600,000. Thus, Debtor's equity in the property is more than \$3,000,000 and Movant is significantly oversecured. Debtor's counsel presented to the Court that Debtor owes an additional \$500,000 to Movant, which is secured by a mortgage on six modular homes. Without considering the value of Debtor's modular homes, Debtor's equity in the farmland is enough to satisfy all of Debtor's debt to Movant, while leaving funds and other properties to pay additional claims on the estate. Movant's foreclosure sale, which the Court permitted Movant to cry, resulted in bids on the property that were insufficient to fully pay the debts secured by the farmland. Thus, if the Court were to validate Movant's foreclosure sale, Debtor would still have a \$500,000 debt to Movant and the estate would not benefit from Debtor's extensive equity.

II. APPLICABILITY OF 11 U.S.C. § 109(g)(2)

Eligibility of debtors in bankruptcy is governed by 11 U.S.C. § 109. Pertinent to Movant's present Motion and Debtor's present case, 11 U.S.C. § 109(g)(2) provides that

Notwithstanding any other provisions of this section, no individual or family farmer may be a debtor under this title who has been a debtor in a case pending under this title at any time in the preceding 180 days if . . . (2) the debtor requested and obtained the voluntary dismissal of the case following the filing of a request for relief from the automatic stay provided by section 362 of this title.

This section of the Bankruptcy Code is intended to prevent abusive behavior by debtors who seek to avoid a creditor's efforts to recover property. *E.g., In re Ulmer*, 19 F.3d 234, 235 (5th Cir. 1994); *In re Patton*, 49 B.R. 587, 589 (Bankr. M.D. Ga. 1985) (finding that the statute "is intended to address the situation in which the debtor files a bankruptcy case to stay a foreclosure, and when the creditor seeks relief from stay, the case is then voluntarily dismissed by the debtor"); *In re Copman*, 161 B.R. 821, 823–824 (Bankr. E.D. Mo. 1993); *see also* Harry Wright IV, *Must Courts Apply Section 109(g)(2) When Debtors Intend No Abuse in an Earlier Dismissal of Their Case?*, 7 BANK. DEV. J. 103, 106–107 (1990).

As § 109(g)(2) is intended to protect creditors from abusive repetitive filings, the section is not meant to be rigidly applied such that it produces inequitable results to the detriment of a non-abusive debtor. *See, e.g., In re Patton*, 49 B.R. at 589 (denying dismissal of case after finding no "abusive repetitive filings" and no prejudice to the creditor in the voluntary dismissal of the prior case); *In re Milton*, 82 B.R. 637, 639–640 (Bankr. S.D. Ga. 1988); *In re Copman*, 161 B.R. at 824 (denying dismissal of case when debtor's voluntary dismissal was not in response to other creditors' motions for relief and did not prejudice the creditor in the second case). Instead, the Court must look for a causal connection between motions for relief from stay and the debtor's voluntary dismissal. *In re Sole*, 233 B.R. 347, 350 (Bankr. E.D. Va. 1998). "Absent the causal connection, section 109(g)(2) is not triggered and the debtor is not barred from re-filing for 180 days." *In re Sole*, 233 B.R. at 350.

Debtor's case does not trigger § 109(g)(2). Movant has not established a causal connection between its Motion for Relief and Debtor's dismissal of her prior case. Instead, Debtor testified to unusual circumstances leading to her dismissal and refiling. Debtor's case history is unique in that

Debtor's original case was a Chapter 13 case for which Debtor was ineligible. In the prior case, Movant sought conversion or dismissal of Debtor's case, and Debtor filed a motion to convert her case to a Chapter 11, for which she was eligible.

Additionally, Debtor's filing of a Chapter 11 case now has not caused any prejudice to Movant. While Debtor's dismissal of her Chapter 13 and subsequent refiling of a Chapter 11 case has caused a two month delay as compared to Debtor merely converting the Chapter 13 case to a Chapter 11, the delay has not damaged Movant's interests. Debtor has extensive equity in the property that secures Movant's debt and Movant is thus oversecured and adequately protected.

III. CONCLUSION

Dismissing Debtor's case or validating Movant's foreclosure sale will not best protect all the parties in interest. Debtor's case history does not represent the harm § 109(g)(2) is intended to remedy, so her present case should not be dismissed. Movant's foreclosure sale bid would not pay off all the debt on Debtor's farmland, much less the debt on her other property or debts to unsecured creditors, which would deny other creditors the benefit of Debtor's equity in her property. Therefore, upon consideration of the Motion and the argument of counsel, and for the reasons stated on the record, it is

ORDERED that Movant's Motion to Dismiss is **DENIED**.

IT IS FURTHER ORDERED that Movant's alternative Motion for Relief from Stay to Validate Sale is **DENIED**.

The Clerk shall serve a copy of this Order upon Debtor, counsel for Debtor, the U.S. Trustee, all creditors in the case, and the party on the attached distribution list.

END OF DOCUMENT

Distribution List

HGP Capital, LLC
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